

**NOVA SCOTIA COURT OF APPEAL**

Cite as O'Brien v. Clark, 1995 NSCA 2

**BETWEEN:**

NORMA LOUISE O'BRIEN and  
BARBARA CLARK

Appellants

- and -

ROBERT E. CLARK, PAULETTE CLARK  
and COLIN CLARK, an infant by his  
Guardian Ad Litem, Robert E. Clark

Respondents

)  
) R. Malcolm Macleod  
) for the appellants

)  
) J. Brian Church, Q.C.  
) for the respondents

)  
) Application Heard:  
) March 30, 1995

)  
) Decision Delivered:  
) April 7, 1995

**BEFORE THE HONOURABLE RONALD N. PUGSLEY,  
IN CHAMBERS**

**PUGSLEY, J.A.: (in Chambers)**

This is an application for a stay of execution in an appeal from a judgment awarding the respondent, Paulette Clark, damages of approximately \$410,000.00 arising out of injuries sustained in a motor vehicle accident that occurred on July 22, 1988.

The respondent, Robert Clark, was operating his motor vehicle, in which his wife Paulette and their two children were passengers, on Quinpool Road in Halifax when they were struck from the rear by a vehicle owned by the appellant, Norma O'Brien, and operated by the appellant Barbara Clark.

After a trial of approximately six days, the trial judge awarded Paulette Clark general damages of \$45,000.00, past lost income and interest of \$82,443.53 and lost future income of \$272,923.00. She and her husband were awarded special damages of \$563.15 and their infant son, Colin, was awarded general damages of \$250.00.

The trial judge also awarded costs of \$20,850.00 together with disbursements.

In support of the application for a stay, the appellants' solicitor deposes by affidavit:

- "i) There are arguable issues on appeal;
- ii) if no stay of execution is granted and the appeal is successful, there is potential for irreparable harm; and
- iii) the potential harm to the appellant is greater than that to the respondent should this stay not be granted."

At the commencement of the application, I set the appeal for hearing on September 20, 1995.

After reviewing the notice of appeal, I advised counsel that I considered that the grounds of appeal raised arguable issues and hence the first part of the **Fulton**

test had been satisfied. (See **Fulton Insurance Agencies Ltd. v. Purdy** (1991), 100 N.S.R. (2d) 341.)

I also expressed the view that a mere deposition by an appellants' solicitor that there is "potential for irreparable harm" did not satisfy the burden imposed upon the appellant to meet the second stage of the **Fulton** test, ie., that "if the stay is not granted and the appeal is successful, the appellant will have suffered irreparable harm that is difficult to, or cannot be compensated for by a damage award."

This conclusion was strengthened by reviewing the decision of the trial judge which discloses that Paulette Clark (who is 40 years of age) and her husband own their own home and that both appear to be diligent, responsible people.

The appellants' counsel submitted that if he failed to meet the primary test set out in **Fulton** that he was content to base his application on the further test in **Fulton**, namely, "that there are exceptional circumstances that would make it fit and just that the stay be granted in the case."

Upon being granted leave to place additional material before the Court, he filed a supplementary affidavit submitting that the following exceptional circumstances justify the granting of his application:

- (a) The future lost income component of the award is \$272,923.00 and this loss has not yet accrued to the plaintiff;
- (b) The past lost income, \$82,443.53, was covered by long term disability insurance, and the plaintiff receives 70% of her gross pay from the long term disability insurer;
- (c) The plaintiff continues to receive 70% of her gross pay from the long term disability insurer;
- (d) (His client) has raised arguable issues on appeal, and
- (e) (His client) has no objection to paying the balance of the judgment which is \$45,000.00 for general damages and \$28,850.00 for costs.

Rule 62.10 of the Rules of Civil Procedure provides:

(1) The filing of a notice of appeal shall not operate as a stay of execution of the judgment appealed from.

(2) A Judge on application of a party to an appeal may, pending disposition of the appeal, order stayed the execution of any judgment appealed from or of any judgment or proceedings of or before a magistrate or tribunal which is being reviewed on an appeal under Rules 56 and 58 or otherwise.

(3) An order under Rule 62.10(2) may be granted on such terms as the Judge deems just.

...

As noted by Justice Freeman of this Court in **Coughlan v. Westminer Canada Limited** (1994), 125 N.S.R. (2d) 171 at 174:

"Stays deprive successful parties of their remedies, and they are not granted routinely in this province. They are equitable remedies and the party seeking the stay must satisfy the court it is required in the interests of justice."

There is no evidence before me to establish that the respondents are likely to flee the jurisdiction, or that if the award is paid that it is probable that they would not be able to repay the judgment, or any substantial portion of it, in the event the appeal is successful. There is no proof that they have creditors poised to seize the award as soon as they receive it. The findings of fact made by the trial judge with respect to their stability and responsibility operate against this contention.

The appellants, however, may nevertheless be successful in their application if they can satisfy the court that there are "exceptional circumstances that would make it fit and just that the stay be granted in the case" (**Fulton, supra**, at p. 174).

Exceptional circumstances would exist if, for example, the "judgment appealed from contains an error so egregious that it is clearly wrong on its face, it would be fit and just that execution should be stayed pending the appeal" (Freeman, J.A. in **Coughlan v. Westminer, supra**, at p. 175).

I have examined the trial judgment and I cannot say that it contains any error so egregious that it is clearly "wrong on its face". The appeal notice raises arguable issues but that is a long way from saying the judgment raises exceptional circumstances sufficient to meet the secondary test.

The thrust of the appellants' argument is that exceptional circumstances exist because the majority of the trial judge's award of damages relates to future lost income (\$273,000.00 of a total award of \$410,000.00), that this loss has not yet accrued, and further that the respondent, Paulette Clark, received 70% (approximately \$56,000.00) of her past lost income from her long term disability insurer.

Although this is not stated in counsel's affidavit, he submitted at the time of the Chambers hearing that the respondent, Paulette Clark, would be required to turn over to her disability insurers 70% of her past lost income, as well as 70% of the future lost income.

No authority has been presented to suggest that collateral benefits are a valid consideration for the Court, let alone constitute "exceptional circumstances" within the **Fulton** rule, in a stay application.

If the respondent, Paulette Clark, is under any obligation to turn over the funds to a disability insurer, then presumably her counsel would ensure that the funds would be repayable by the disability insurer in the event the appellants' appeal is successful.

The appellants are therefore afforded the additional protection of an insurer standing behind the respondent, Paulette Clark, for repayment of funds in the event the appeal is allowed.

With respect to the submission that the future lost income component has not yet accrued to the respondent, Paulette Clark, the trial judge has determined that she suffered injuries "which have functionally disabled her to the point where she'll never be able to return to an economically productive lifestyle. That is, she'll never be able to return to work."

The award for future lost wages constitutes the present value of the income she has lost consequent upon her injuries. She was, in the opinion of the trial judge, presently entitled to an award of \$273,000.00 for future lost income.

I am not convinced that there are exceptional circumstances in this case that make it "fit and just" that the stay be granted.

The application is therefore dismissed with costs in the cause.

J.A.